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No. 91-339

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WALTER LEE, Superintendent of Port Authority Police,

Cross-Petitioner,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and BRIAN RUMBAUGH,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CROSS-RESPONDENTS' RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether expressive activities which are not incompatible with the normal activity of a particular place at a particular time may be entirely prohibited in a nonpublic forum.

2. Whether expressive activities such as the distribution of religious literature and solicitation of donations which do not disrupt or interfere with airport operations may be prohibited in the public areas of the airport terminals.

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RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI

The Port Authority of New York and New Jersey (the Port) has filed a cross-petition for a writ of certiorari to review that portion of the court of appeals' decision affirming the right of the International Society for Krishna Consciousness, Inc. and Brian Rumbaugh (hereinafter collectively referred to as ISKCON) to distribute religious literature in the public concourses of the three metropolitan New York airports.

The appropriate standard to be applied in analyzing expressive activities in nonpublic fora is an important issue in need of clarification. As an overriding matter, however, ISKCON contends that airport terminals, as vital public thoroughfares, are paradigmatic public fora. Accordingly, to the extent that the Court finds airport terminals to be public fora, it will not be necessary to reach the issues raised by the Port.

ISKCON, nevertheless, does not oppose the Port's cross-petition. Publicly owned facilities that do not possess the characteristics of airports and other public thoroughfares may still be appropriate places for the exercise of First Amendment rights. On this basis, ISKCON believes that review of the reasonableness standard applied to nonpublic fora would not be without purpose.

I. SPEECH IN A NONPUBLIC FORUM MAY NOT BE BANNED UNLESS IT IS SHOWN TO BE INCOMPATIBLE WITH THE NORMAL ACTIVITY OF A PARTICULAR PLACE AT A PARTICULAR TIME.

As a general rule, "[p]ublic property which is not by tradition or designation a forum for public communication

may be reserved by the State 'for its intended purposes, communicative or otherwise.' " *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). However, even in a nonpublic forum, any regulation of speech must be "reasonable and not an effort to suppress speech merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

As many courts have decided, whether a restriction on speech in a nonpublic forum is "reasonable" depends on whether the expressive activity is unavoidably incompatible with the normal activity of a particular place at a particular time. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

In *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983), for example, the court found a state-owned railway bed to be neither a traditional nor designated public forum. Yet, the court held that the First Amendment activities of a group opposed to the construction of a proposed interstate highway could not be broadly prohibited absent a showing by the state of incompatibility.

> Although the state may indeed protect its "special interest" in preserving the corridor for future transportation purposes (an interest, we note, which appellants fully endorse), we are unable to discern any interference with that purpose resulting from the proposed Railathon.

Id. at 1055.

Similarly, in *Gannett Satellite Information Network v. Metropolitan Authority*, 745 F.2d 767 (2d Cir. 1984), the court noted that "[p]ublic property, like the public areas

of MTA stations, which is neither a traditional nor a designated public forum, can still serve as a forum for First Amendment expression if the expression is appropriate for the property." *Id.* at 773. Applying this standard, the court found "[t]he public areas of MTA stations . . . appropriate forums for the sale of newspapers through newsracks. The thousands of commuters who pass through the station each day provide a ready market for morning newspapers . . . . The presence of newsracks is not incompatible with the operation of MTA stations." *Id.*

In finding RFK Stadium to be a public forum, the Court of Appeals for the District of Columbia declared as follows:

> [T]he compatibility of public property with expressive activity enters into the first amendment analysis in two different ways. In the first place . . . compatibility provides some evidence of the government's intent. Then, once the nature of the forum has been established, compatibility is relevant to the ultimate determination of whether restrictions on speech are either reasonable or narrowly tailored to a compelling state interest (the constitutional standards for nonpublic and public fora, respectively).

Stewart v. District of Columbia Armory Board, 863 F.2d 1013, 1017-018 (D.C. Cir. 1988).

The compatibility standard for assessing the constitutionality of restrictions on speech in a nonpublic forum is consonant with this Court's cases. In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), for example, utility poles were held to be nonpublic fora. However, the ban on signs was held valid not because the

poles were neither traditional nor designated fora, but "because the interest supporting the regulation, an aesthetic interest in avoiding visual clutter and blight, rendered *each* sign an evil." *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (emphasis added). A complete prohibition of signs was thus necessary not because the utility poles were a nonpublic forum *per se*, but "because 'the substantive evil – visual blight – [was] created by the medium of expression itself.' " *Id.* (quoting *Vincent*, 466 U.S. at 810). Put simply, the signs were wholly incompatible with use of the utility poles at all relevant times.[1]

II. THE PERIPATETIC DISTRIBUTION OF RELIGIOUS LITERATURE AND SOLICITATION OF DONATIONS IS NOT INCOMPATIBLE WITH USE OF THE AIRPORT TERMINALS.

As set forth in ISKCON's Petition For A Writ Of Certiorari, the New York metropolitan airports are a public forum in which a prohibition of speech is invalid unless it is the least restrictive means of achieving a significant state interest. Under this standard, neither the prohibition of religious literature nor the solicitation of donations survives constitutional scrutiny.

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[1] *Cf. Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 799-800 (1985) ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property *or the disruption that might be caused by the speaker's activities.*") (emphasis added).

However, the Port's restrictions fail even under the less rigorous compatibility analysis for determining the reasonableness of a government restriction in a nonpublic forum. In seeking to determine whether Nassau County intended to establish and maintain Veterans Memorial Coliseum as a place for communicative activities, for example, the court of appeals in *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991) observed that the Coliseum "contains a large outside area which includes a mall and a network of sidewalks" that frequently serve as "the site of boisterous recreational activity." *Id.* at 70.[2] After concluding that "the Coliseum compound can comfortably accommodate a wide variety of expressive activities at the same time" *id.*, the court emphasized: "We do not believe [the dissemination of leaflets] at the stadium threaten[s] the same type of basic government functions that are implicated in a post office, *Kokinda, supra*, military bases, *Greer, supra*, or at federal workplaces, *Cornelius, supra.*" *Id.*

The same is true for the solicitation of donations. Whether airport terminals are classified as public or nonpublic fora, the momentary pause engendered by the mechanical transfer of money is surely no more disruptive of the normal activities of an airport than is the chaos and pandemonium attendant to the countless press conferences and "photo opportunities" held by politicians,

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[2] *See Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 90 (2d Cir.) ("The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order."), *cert. denied*, 313 U.S. 940 (1968).

world leaders and other public figures who regularly use the corridors of John F. Kennedy, Newark, and LaGuardia airports as a stage to promote their names and causes. Nor does the exchange of money and literature interfere with airport operations any more than the thousands of sports fans who frequently greet their victorious idols at the gates, or picketers and demonstrators protesting a controversial college professor in the terminal lobbies and thoroughfares. Not only is the distribution of literature and solicitation of donations not incompatible with airport operations, but it is inherently consistent with the function, purpose and design of such facilities.

CONCLUSION

ISKCON maintains that airport terminals are a public forum from which expressive activities such as the distribution of religious literature and solicitation of donations may not be banned. Nor may such activities be prohibited in a nonpublic forum unless it is shown that they are incompatible or interfere with airport operations. On this basis, ISKCON does not oppose the Port's cross-petition for a writ of certiorari.

Respectfully submitted,

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